

NIH POLICY MANUAL

6342-2 - FUNDING OF COST OVERRUNS

Issuing Office: FASB, OA/DCG 496-4401

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1. **Explanation of Material Transmitted:** This chapter provides guidance promulgated by HHS on the use of fiscal year funds for payment of cost overruns on cost-reimbursement contracts.

2. **Filing Instructions:**

Remove: None - Replaces I&I Memorandum DCG 84-5, Funding of Cost Overruns

Insert: NIH Manual 6342-2, Funding of Cost Overruns, dated 10/26/92.

3. **Distribution:** NIH Mailing Keys F-401, F-407

PLEASE NOTE: For information on:

- content of this chapter, contact the Division of Acquisition Policy and Evaluation, OCM, OA, on (301) 496-6014.
- NIH Manual Mailing Keys, contact the Division of Support Services, ORS, on (301) 496-4808.
- NIH Manual System, contact the Division of Management Support, OMA, on (301) 496-2832.
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A. Purpose and Background:

This issuance provides the guidance promulgated by HHS on the use of fiscal year funds for payment of cost overruns on cost-reimbursement contracts. The following instructions do not apply to cost alignments within the contract ceiling.

B. References:

1. FAR Part 42, Contract Administration
2. HHSAR 342.71, Administrative Actions for Cost Overruns

C. Procedures:

1. Use of Prior Year Funds

If the cost overrun is based upon an antecedent legal right of the contractor to have the overrun funded, then the overrun should be paid with funds from the appropriation that was originally charged. The contractor has an antecedent legal right to payment if the decision is not discretionary (the contractor is legally entitled to the funding).

Example: The contractor would have an antecedent legal right under circumstances whereby it could not have known of the overrun in time to give the required notice. Such circumstances (e.g., the General Electric Case, 194 Ct. Cl. 678, 440 F.2d 420 (1971)) are expected to be encountered rarely and should be applied narrowly to cost overruns.

The circumstances cited above are to be contrasted with situations where the contractor gives notice of anticipated cost overruns under the Limitation of Cost/Funds Clause and the contracting officer has the discretion to either allocate additional funds or to bring the work to a halt. In those situations, if the contracting officer decides to allocate additional funding, the funding must be made from the current appropriation, not from prior year funds.

2. Use of Current Year Funds

If the cost overrun is based not upon an antecedent legal right but upon the contracting officer's discretionary authority, then funding of the overrun must come from the appropriation current at the time discretionary authority is exercised.

3. Indirect Cost Rates

If the contractor anticipates an overrun because final indirect cost rates will be higher than provisional rates, the contractor is obligated to notify the contracting officer on each contract. A notice to a central office (e.g., the indirect cost negotiator) is not sufficient and will not be regarded as constructive notice to the contracting officer. If the contractor gives a late notice on an indirect cost overrun alleging that it could not have known about the increased rates in time to give more timely notice, the contracting officer should consult the Financial Advisory Services Branch (FASB) for advice. The FASB opinion concerning whether the contractor "could have known" is advisory. However, as with other recommendations from pricing personnel or contract auditors, if FASB's recommendations are not followed, the contracting officer should document the contract file with adequate justification for disregarding FASB's advice.

4. Request for Certification of Prior Year Funds

The contracting officer's written request to the Division of Financial Management to certify prior year funds should recite the circumstances and must include the basis for the contracting officer's opinion that the contractor has an antecedent legal right to have the overrun funded.

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